

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

THE DIAL CORPORATION,  
HENKEL CONSUMER GOODS INC.,  
H. J. HEINZ COMPANY,  
H. J. HEINZ COMPANY, L.P.,  
FOSTER POULTRY FARMS,  
SMITHFIELD FOODS, INC.  
HP HOOD LLC,  
BEF FOODS, INC., and  
SPECTRUM BRANDS, INC.,  
Individually and On Behalf of  
Similarly Situated Companies,

Plaintiffs,

v.

NEWS CORPORATION,  
NEWS AMERICA INC.,  
NEWS AMERICA MARKETING FSI L.L.C.,  
and NEWS AMERICA MARKETING IN-  
STORE SERVICES L.L.C.,

Defendants.

Civil Action No. 13-CV-06802-WHP

ECF Case

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP  
2001 K Street, N.W.  
Washington, DC 20006-1047  
Tel: (202) 223-7300  
Fax: (202) 223-7420

1285 Avenue of the Americas  
New York, NY 10019-6064  
Tel: (212) 373-3000  
Fax: (212) 757-3990

*Counsel for Defendants*

**HIGHLY CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER  
SUBJECT TO DEFENDANTS' UNOPPOSED MOTION TO SEAL**

## **TABLE OF CONTENTS**

PRELIMINARY STATEMENT .....	1
COMPLAINT ALLEGATIONS .....	4
ARGUMENT .....	5
I. Plaintiffs’ Motion Fails as a Matter of Law Under <i>Comcast</i> .....	6
II. Plaintiffs Fail to Establish Common Proof of Antitrust Injury and Damages Because ISP Prices Are Determined by Highly Individualized Factors.....	8
A. ISP Prices Vary Greatly Based on a Large Number of Individualized Factors.....	9
B. Plaintiffs Fail to Establish Classwide Injury By Common Proof Because They Fail to Account for the Benefits of NAM’s Alleged Conduct to Some Class Members. ....	11
C. Dr. MacKie-Mason’s Regression Fails to Show That Impact Can Be Established by Common, Rather than Individualized, Proof. ....	15
D. Plaintiffs Have Not Shown that Increased Competition in the But-For World Would Lead to Lower ISP Prices for Any or All Class Members.....	18
III. Dr. MacKie-Mason’s “Benchmark” Model Fails as a Matter of Law.....	19
A. Dr. MacKie-Mason’s Model Fails to Establish Comparability. ....	20
B. Dr. MacKie-Mason’s Model Fails to Account for Significant Differences Between the Benchmark Companies and NAM. ....	22
C. Dr. MacKie-Mason Improperly Uses Averages in His Benchmark. ....	23
IV. Plaintiffs Do Not Satisfy Other Requirements of Rule 23.....	24
V. The Proposed Injunctive Relief Class Cannot Be Certified Under Rule 23(b)(2).....	25
CONCLUSION.....	25

**TABLE OF AUTHORITIES**

	<b><u>Page(s)</u></b>
<b>CASES</b>	
<i>Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp. L.P.</i> , 247 F.R.D. 156 (C.D. Cal. 2007) .....	passim
<i>Arden Architectural Specialties, Inc. v. Wash Mills Electro Minerals Corp.</i> , 2002 WL 31421915 (W.D.N.Y. Sept. 17, 2002) .....	21
<i>Bell Atl. Corp. v. AT&amp;T Corp.</i> , 339 F.3d 294 (5th Cir. 2003) .....	6
<i>Blades v. Monsanto Co.</i> , 400 F.3d 562 (8th Cir. 2005) .....	8
<i>Blue Cross &amp; Blue Shield United of Wis. v. Marshfield Clinic</i> , 152 F.3d 588 (7th Cir. 1998) .....	22
<i>Cannon v. BP Prods. N. Am., Inc.</i> , No. 3:10-CV-00622, 2013 WL 5514284 (S.D. Tex. Sept. 30, 2013) .....	23
<i>Comcast v. Behrend</i> , 133 S. Ct. 1426 (2013) .....	passim
<i>Cont'l Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater N.Y., Inc.</i> , 198 F.R.D. 41 (E.D.N.Y. 2000) .....	5
<i>In re ConAgra Foods, Inc.</i> , No. 11-cv-5379 MMM, 2014 WL 4104405 (C.D. Cal. Aug. 1, 2014) .....	6
<i>Cordes &amp; Co. Fin. Servs. v. A.G. Edwards &amp; Sons</i> , 502 F.3d 91 (2d Cir. 2007) .....	5
<i>In re Dynamic Random Access Memory (DRAM) Antitrust Litig.</i> , No. M 02-1486 (PJH), 2006 WL 1530166 (N.D. Cal. June 5, 2006) .....	16, 17
<i>El Aguila Food Prods., Inc. v. Gruma Corp.</i> , 131 F. App'x 450 (5th Cir. 2005) .....	21
<i>In re Elec. Books Antitrust Litig.</i> , No. 11 MD 2293, 2014 WL 1282293 (S.D.N.Y. Mar. 28, 2014) .....	16, 17
<i>Eleven Line, Inc. v. N. Tex. State Soccer Ass'n</i> , 213 F.3d 198 (5th Cir. 2000) .....	24

<i>Exhaust Unlimited, Inc. v. Cintas Corp.</i> , 223 F.R.D. 506 (S.D. Ill. 2004) .....	9
<i>In re Global Crossing, Ltd. Sec. Litig.</i> , 471 F. Supp. 2d 338 (S.D.N.Y. 2006).....	25
<i>In re Graphics Processing Units Antitrust Litig.</i> , 253 F.R.D. 478 (N.D. Cal. 2008).....	16
<i>Harris Wayside Furniture Co. v. Idearc Media Corp.</i> , No. 06-cv-392, 2008 WL 7109357 (D.N.H. Dec. 22, 2008) .....	20, 21, 22
<i>Home Placement Serv. Inc. v. The Providence Journal Co.</i> , 819 F.2d 1199 (1st Cir. 1987).....	20
<i>In re Initial Pub. Offerings Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006).....	5, 17, 21
<i>Kottaras v. Whole Foods Mkt., Inc.</i> , 281 F.R.D. 16 (D.D.C. 2012).....	9
<i>Kottler v. Deutsche Bank AG</i> , No. 05 Civ. 7773 (PAC), 2010 WL 1221809 (S.D.N.Y. Mar. 29, 2010) .....	25
<i>In re Live Concert Antitrust Litig.</i> , 863 F. Supp. 2d 966 (C.D. Cal. 2012) .....	22
<i>In re NASDAQ Market-Makers Antitrust Litig.</i> , 169 F.R.D. 493 (S.D.N.Y. 1996) .....	21
<i>In re Optical Disk Drive Antitrust Litig.</i> , No. 10-md-2143, 2014 WL 4965655 (N.D. Cal. Oct. 3, 2014).....	18
<i>Picket v. Iowa Beef Processors</i> , 209 F.3d 1276 (11th Cir. 2003) .....	12
<i>In re Rail Freight Fuel Surcharge Antitrust Litig.</i> , 725 F.3d 244 (D.C. Cir. 2013) .....	7, 19
<i>Turnbow v. Life Partners, Inc.</i> , Civil Action No. 3:11-cv-1030-M, 2013 WL 3479884 (N.D. Tex. July 9, 2013).....	6
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011).....	5, 21, 25

**STATUTES**

Fed. R. Civ. P. 23 .....	5, 24
--------------------------	-------

**OTHER AUTHORITIES**

Daniel L. Rubinfeld, <i>Antitrust Damages</i> , in Research Handbook on the Economics of Antitrust Law (Einer Elhauge ed., 2012).....	20, 21, 22
Phillip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law: An Analysis of Antitrust Principles and Their Application</i> (3d ed. 2007) .....	20
Herbert H. Hovenkamp, <i>Economic Experts in Antitrust Cases</i> , in 5 Modern Scientific Evidence: The Law and Science of Expert Testimony (Dennis L. Faigman, <i>et al.</i> , eds., 2013-14) .....	22

**PAGES 1–25 INTENTIONALLY OMITTED**

Dated: October 10, 2014

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON, LLP

By: /s/ Kenneth A. Gallo  
Kenneth A. Gallo (kgallo@paulweiss.com)  
Jane B. O'Brien (jobrien@paulweiss.com)  
2001 K Street, NW  
Washington, D.C. 20006-1047  
(202) 223-7300

William B. Michael (wmichael@paulweiss.com)  
1285 Avenue of the Americas  
New York, NY 10019-6064  
(212) 373-3000

*Counsel for Defendants*